

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026

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In the Matter of:

MOTORS LIQUIDATION COMPANY, et al.,

f/k/a General Motors Corp., et al.,

Debtors.

- - - - -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

August 4, 2009

9:03 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

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Hearing re: Limited Contract Objections - Cure Amount.

Decision to be read.

Hearing re: Omnibus Motion of Debtors for Entry of Order  
Authorizing (A) the Rejection of Executory Contracts and  
Unexpired Leases with Certain Domestic Dealers and (B) Granting  
Certain Related Relief. Decision to be read.

Transcribed By: Hana Copperman

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A P P E A R A N C E S :

WEIL, GOTSHAL & MANGES LLP

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767 Fifth Avenue

New York, NY 10153

BY: JOSEPH H. SMOLINSKY, ESQ.

(TELEPHONICALLY)

CARSON FISCHER, P.L.C.

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4111 Andover Road, West - Second Floor

Bloomfield Hills, MI 48302

BY: PATRICK J. KUKLA, ESQ.

(TELEPHONICALLY)

1 P R O C E E D I N G S

2 THE COURT: Good morning. This is Judge Gerber. May  
3 I found out who's on the phone, please?

4 OPERATOR: Yes, Your Honor. We have Patrick Kukla and  
5 Joseph Smolinsky.

6 THE COURT: All right. Mr. Smolinsky, can you hear me  
7 okay?

8 MR. SMOLINSKY: Yes, Judge, I can.

9 THE COURT: Mr. Kukla?

10 MR. KUKLA: Yes, Your Honor.

11 THE COURT: Thank you. All right. Gentlemen, I'm  
12 ruling that determining whether or not the Tools Contract is  
13 executory requires an evidentiary hearing, but that no  
14 evidentiary hearing is required to rule on whether the  
15 Production Contract and the Service Contract are a single  
16 integrated contract. And I'm ruling, with respect to the  
17 latter matter, that the two contracts are two contracts -- not  
18 a single integrated contract -- and that if Motors Liquidation  
19 wants to reject the Production Contract without also rejecting  
20 the Service Contract, Motors Liquidation may do so. The  
21 following are my Findings of Fact, Conclusions of Law, and  
22 bases for the exercise of my discretion in connection with this  
23 determination.

24 On the Tools Contract, first, I came very close to  
25 interrupting each of you to say "you're testifying". Each of

1 you lawyers was making representations to me as to your view of  
2 the facts, about your knowledge of the automotive industry,  
3 your belief as to the purposes of the various provisions in the  
4 tools contract, and even your belief as to what abbreviations  
5 stand for, and what ambiguous words and expressions signify.  
6 That's obviously unsatisfactory, as one or both of you  
7 recognized in oral argument. While I well understand the point  
8 you, Mr. Smolinsky, made, that it likely doesn't take three  
9 years to provide a piece of tooling, and that references to  
10 effective dates in the agreement refer to something else,  
11 that's still not the kind of thing where I can find the intent  
12 of the document, much less the meaning of covenants that are  
13 described in shorthand, and that might rely on custom and  
14 practice in the industry, without an evidentiary hearing.  
15 Likewise, I'm not in a position to make a finding as to what  
16 expressions do mean.

17 So I'm not in a position to make Findings of Fact, or  
18 to issue Conclusions of Law, with respect to the Tools  
19 Contract, until the necessary evidentiary hearing has been  
20 completed.

21 So we'll need to have one.

22 Now, turning to the Production Contract and the  
23 Service Contract.

24 I'm going to pause for a minute. Gentlemen, I'm not  
25 going to exclude you from the courtroom, but I need you to sit

1 down quietly and quickly.

2 However, I can make Findings of Fact with respect to  
3 the Production Contract and Service Contract, and now do so.

4 Turning first to the Production Contract and its  
5 contents. Various Production Contract documents were entered  
6 into, but one attached to Motors Liquidation's reply on its  
7 rejection motion can be viewed as a prototype from which the  
8 others don't differ. It starts with a "Contract Header," of  
9 one page, which lists name and address information for each of  
10 the Supplier, that being Karmann Manufacturing LLC, and the  
11 Buyer, GM. The Contract Header goes on to say, in relevant  
12 part, that "This contract sets forth the exclusive terms and  
13 conditions under which seller shall sell and buyer shall  
14 purchase the goods or services described in the line item  
15 detail of this contract for the period specified therein".

16 The "Line Item Detail" follows the Contract Header,  
17 and goes on for 13 pages.

18 After some preliminary tabular data, including an  
19 "Issue Date" of 16 January, 2009, it provides that "This Line  
20 Item is effective from 31 January, 2009 through 24 January,  
21 2011".

22 Contract Line Item Page 1 of 13. When you put those  
23 two together, plugging in the dates following "This Line Item  
24 is effective" where it says, after the mention of "the line  
25

1 item detail of this contract," "for the periods set forth  
2 therein," one gets, effectively:

3 "This contract sets forth the exclusive terms and  
4 conditions under which seller shall sell and buyer shall  
5 purchase the goods or services described in the line item  
6 detail of this contract for the period 31 January, 2009 through  
7 24 January, 2011."

8 Contract Header Page 1 of 1, with cross-reference  
9 substitution made.

10 The "Line Item Detail" portion also addresses the  
11 matter of quantity. It provides, in relevant part:

12 "The quantity of goods to be purchased under this  
13 contract is based on Buyer's requirements. Any forecasted  
14 quantity that may be given to seller is an estimate, for  
15 planning purposes only. Actual quantities to be purchased will  
16 vary and will be set forth in delivery schedules."

17 Contract Line Item Page 12 of 13.

18 There follows six pages of "Contract Attachment"  
19 pages. The first of these provides, in relevant part, in an  
20 unnumbered paragraph captioned "Special Term: Long Term  
21 Contract":

22 "The term of this contract is for the periods of  
23 purchase indicated in the Line Item Notes on the face of this  
24 contract.

25 "The prices for the goods are set forth in the Line

1 Item Notes of this contract. No adjustments will be made for  
2 increases in Seller's costs, including, but not limited to,  
3 increases in the costs for labor, material or overhead.

4 "Seller shall assure that the goods remain competitive  
5 in terms of price, technology, design and quality with similar  
6 goods available to Buyer. If, in the reasonable opinion of  
7 Buyer, the goods do not remain competitive, Buyer, to the  
8 extent it is free to do so, will advise Seller in writing of  
9 the areas in which another product is more competitive with  
10 respect to price, technology, design or quality. If, within  
11 thirty days, Seller does not agree to immediately sell the  
12 goods at a competitive price, or, if applicable, with  
13 comparable technology, design or quality, Buyer may terminate  
14 this contact and purchase from another supplier without  
15 liability to Seller. In consideration for this, during the  
16 term of this contract Buyer will not exercise its rights under  
17 Paragraph 13, 'Termination for Convenience', except for  
18 terminations due to program cancellations or modifications."

19 Paragraph 13, "Termination for Convenience," provides,  
20 in relevant part:

21 "In addition to any other rights of Buyer to terminate  
22 this contract Buyer may, at its option, immediately terminate  
23 all or any part of this contract, at any time and for any  
24 reason, by giving written notice to Seller. Upon such  
25 termination, Buyer shall pay to Seller various contractually



1 prescribed amounts."

2 Paragraph 20, "Service and Replacement Parts,"  
3 provides in full:

4 "Seller will sell to Buyer goods necessary for it to  
5 fulfill its current model service and replacement parts  
6 requirements at the prices set forth in this contract. If the  
7 goods are systems or modules, Seller will sell the components  
8 or parts that comprise the system or module at prices that  
9 shall not, in the aggregate, exceed the price of the system or  
10 module less assembly costs. During the fifteen year period  
11 after Buyer completes current model purchases, Seller will sell  
12 goods to Buyer to fulfill Buyer's past model service and  
13 replacement parts requirements. Unless otherwise agreed to by  
14 Buyer, the prices during the first three years of this period  
15 shall be those in effect at the conclusion of current model  
16 purchases. For the immediate remainder of this period, the  
17 prices for goods shall be as agreed to by the parties. When  
18 requested by Buyer, Seller shall make service literature and  
19 other materials available at no additional charge to support  
20 Buyer's service part sales activities."

21 Emphasis added.

22 Gentlemen, I think what I'm going to do is attach the  
23 document from which I'm reading to the order, so that you can  
24 see which words I've emphasized and so that the provisions in  
25 the agreement that I quoted are more easily readable for you.

1 I'm going to continue.

2 Paragraph 31, captioned "Entire Agreement," provides  
3 in full:

4 "This contract, together with the attachments,  
5 exhibits, supplements or other terms of Buyer specifically  
6 referenced in this contract, constitutes the entire agreement  
7 between Seller and Buyer with respect to the matters contained  
8 in this contract and supersedes all prior oral or written  
9 representations and agreements. This contract may only be  
10 modified by a contract amendment issued by Buyer."

11 Emphasis added.

12 The Production Contract makes no reference to any  
13 other contract, including, most significantly, the Service  
14 Contract. It has no cross-default provision with respect to  
15 any other contract, including, most significantly, the Service  
16 Contract. As noted, the Production Contract includes only that  
17 contract itself, and "the attachments exhibits, supplements or  
18 other terms of Buyer specifically referenced in this contract."

19 Emphasis added.

20 Now, turning to the Service Contract. The Service  
21 Contract is in somewhat different form. The Service Contract,  
22 which oddly is "dated" July 28, 2009, just a few days ago and  
23 after the filing date of Motors Liquidation's motion, and,  
24 indeed, after the filing of Karmann's objection, starts with a  
25 cover sheet with a notation "Consolidated Contract". It's

1 followed by a page of "General Terms and Conditions", then  
2 followed by thirteen pages of additional contractual terms, and  
3 then follows with a one page "Agreement Exhibit" on which the  
4 parts to be sold are listed, with their respective costs.

5 The Service Contract's Cover Sheet provides that:

6 "The Seller agrees to sell and the Buyer agrees to  
7 purchase, at the place and upon and subject to the terms and  
8 conditions on the face and reverse side hereof, approximately  
9 the percentage shown on the attached exhibit, the Buyer's  
10 requirements, between the dates of:

11 "Effective Date June 23, 2007 through Expiration Date  
12 December 31, 2010."

13 The Service Contract has two separate provisions which  
14 are in substance integration clauses. The first, which appears  
15 on the cover sheet, provides:

16 "This order, including the terms and conditions,  
17 contains the complete and final agreement between Buyer and  
18 Seller, and no other agreement in any way modifying any of said  
19 terms and conditions will be binding upon the Buyer unless made  
20 in writing and signed by Buyer's authorized representative."

21 The second, which appears as Paragraph 31 of the  
22 "General Terms and Conditions" immediately following the cover  
23 sheet, is captioned "Entire Agreement." It provides in full:

24 "This contract, together with the attachments,  
25 exhibits, supplements or other terms of Buyer specifically

1 referenced in this contract, constitutes the entire agreement  
2 between Seller and Buyer with respect to the matters contained  
3 in this contract and supersedes all prior oral or written  
4 representations and agreements. This contract may only be  
5 modified by a contract amendment issued by Buyer."

6 Emphasis added.

7 The Service Contract also has its own Paragraphs 13  
8 and 20, identical to those in the Production Contract.  
9 Paragraph 13, "Termination for Convenience," provides, in  
10 relevant part:

11 "In addition to any other rights of Buyer to terminate  
12 this contract, Buyer may, at its option, immediately terminate  
13 all or any part of this contract, at any time and for any  
14 reason, by giving written notice to Seller. Upon such  
15 termination, Buyer shall pay to Seller various contractually  
16 prescribed amounts."

17 Paragraph 20, "Service and Replacement Parts,"  
18 provides in full:

19 "Seller will sell to Buyer goods necessary for it to  
20 fulfill its current model service and replacement parts  
21 requirements at the prices set forth in this contract. If the  
22 goods are systems or modules, Seller will sell the components  
23 or parts that comprise the system or module at prices that  
24 shall not, in the aggregate, exceed the price of the system or  
25 module less assembly costs. During the fifteen year period

1 after Buyer completes the current model purchases, Seller will  
2 sell goods to Buyer to fulfill Buyer's past model service and  
3 replacement parts requirements. Unless otherwise agreed to by  
4 Buyer, the prices during the first three years of this period  
5 shall be those in effect at the conclusion of current model  
6 purchases. For the immediate remainder of this period, the  
7 prices for goods shall be as agreed to by the parties. When  
8 requested by Buyer, Seller shall make service literature and  
9 other materials available at no additional charge to support  
10 Buyer's service part sales activities."

11 Emphasis added.

12 The Service Contract makes no reference to any other  
13 contract, including, most significantly, the Production  
14 Contract. It has no cross-default provision with respect to  
15 any other contract, including, most significantly, the  
16 Production Contract. As noted, the Service Contract includes  
17 only that contract itself, and "the attachments exhibits,  
18 supplements or other terms of Buyer specifically referenced in  
19 this contract."

20 Emphasis added.

21 Turning now to the Nomination Letter. On January  
22 [sic] 28, 2002, five years before the effective date of the  
23 Service Contract and seven years before the effective date of  
24 the Production Contract, GM employee Myka Moon wrote the  
25 Director of Business Development for ASC, Incorporated, with a

1 copy to the Director of Sales & Marketing of Karmann. Ms. Moon  
2 wrote that:

3 "On behalf of GM's North American Advanced Purchasing  
4 team, I am pleased to inform you that the Karmann/ASC joint  
5 venture has been selected as the recommended source for the  
6 Retractable Hardtop for the GMX 381 - 2006 model year."

7 She wrote that "this decision was based upon, among  
8 other things, your quotation to us as follows". After  
9 describing provisions in that quotation, her letter went on to  
10 say:

11 "SPO Service Parts Agreement: Supplier agrees to sell  
12 to SPO above part prices at production price levels for at  
13 least three years beyond the last production year of a  
14 functional part.

15 "Provided that Karmann/ASC is able to meet or exceed  
16 the agreed upon terms for quality, technology, price,  
17 investment/tooling and timing, we intend to issue one or more  
18 Purchase Orders for approximately 100 percent of our production  
19 and service part requirements."

20 Her letter did not call for a counter-signature, nor  
21 did it say or imply that it was an offer that could be accepted  
22 in any way, either by express acceptance or by performance. It  
23 did not purport to be a promise itself; rather, it said "we  
24 intend" to take the action it specified. And the action it  
25 specified was issuing "one or more Purchase Orders".

1 Ultimately two purchase orders were entered -- the Production  
2 Contract and the Service Contract.

3 Karmann contends that the Production Contract and  
4 Service Contract comprise a single integrated document. As a  
5 fact or mixed question of fact and law, I find that they do  
6 not. My reasons for that conclusion appear in my Conclusions  
7 of Law, though to the extent any of those reasons should be  
8 regarded as mixed questions of fact and law, or even as  
9 Findings of Fact, they should be so regarded.

10 Now, turning to my Conclusions of Law.

11 It is of course true that a debtor party to an  
12 executory contract can't cherry pick the elements of the  
13 contract that the debtor wishes to assume or reject, and it is  
14 also true, as Karmann argues, that where several seemingly  
15 separate contracts are part of an integrated whole, they must  
16 be assumed or rejected together. See, for example, my earlier  
17 decision in *In re Adelpia Business Solutions, Inc.*, 322 B.R.  
18 51, 54 (Bankr. S.D.N.Y. 2005), and *In re Kopel*, 232 B.R. 57, 65  
19 n.4 (Bankr. E.D.N.Y. 1999) (dictum), upon which Karmann relies.  
20 But the statement of that uncontroversial principal begs the  
21 question as to whether separate contracts should be deemed to  
22 be a single contract. For example, Judge Swain, deciding  
23 *Kopel*, wherein the enforceability of a cross-default clause in  
24 a lease was at issue, noted that because the lease included an  
25 express cross-default provision that she held to be

1 enforceable, "the Court need not reach the issue of whether the  
2 transaction documents ought to be construed as one contract  
3 under New York law". Id. at 65 n.4.

4 While the issue is ultimately one of state law, I've  
5 been able to discern no material differences in various states'  
6 laws in determining whether one contract should be held to be  
7 severable into two or more, or, as is more commonly the issue  
8 in the bankruptcy context, whether seemingly separate contracts  
9 should be deemed to be only one. Whether a contract is  
10 integrated or severable is a question of the parties' intent,  
11 to be determined from the language employed by the parties,  
12 viewed in light of the circumstances surrounding them at the  
13 time they contracted. See *In re American Home Mortgage*, 379  
14 B.R. 503, 520-521 (Bankr. D. Del. 2008). Absent ambiguity in  
15 the terms of the contract, the parties' intent is gleaned from  
16 the four corners of the instrument. *In re American Home*  
17 *Mortgage Holdings*, 2009 Bankr. LEXIS 439.

18 Typically the cases have relied on particular facts  
19 parties have brought to their attention, but looking at the  
20 cases as a whole, certain factors have been repeatedly  
21 considered. Thus Courts have relied on a number of non-  
22 exclusive factors for evidence of the parties' intent with  
23 respect to the integration or severability of contracts.  
24 These include:

25 1. Whether the nature and purpose of each agreement



1 is different;

2 2. Whether the consideration for each agreement is  
3 separate and distinct;

4 3. Whether the obligations of the parties to each  
5 agreement are interrelated -- i.e., whether performance under  
6 one agreement is dependent on or related to performance under  
7 the terms of the other agreement;

8 4. Whether there is an integration clause stating the  
9 contract is to be considered one agreement;

10 5. Whether a default under one agreement causes or  
11 requires a default under the other agreements;

12 6. Whether the agreements are for the same term,  
13 including whether extensions are permitted on a whole or  
14 partial basis; and whether the agreements are separately  
15 negotiated.

16 See, for example, In re Adelphia Business Solutions,  
17 322 B.R. at 59.

18 As some of these factors have been articulated in the  
19 context of the particular facts before them, we sometimes have  
20 to massage these factors to derive from them their underlying  
21 meaning.

22 It is possible for obligations that appear in a single  
23 contract to nevertheless be held to be separate agreements.

24 See, for example, In re Gardinier, 831 F.2d 974 (11th Cir.  
25 1987). But here, of course, Motors Liquidation is asking for

1 much simpler relief. It's only that I regard two separate  
2 agreements as exactly what they appear to be.

3 Here substantially all of the indicia -- taken from  
4 the four corners of the documents -- evidence the intention  
5 that separate agreements be separate, and, conversely, that  
6 there was no intention to consider them to be a single  
7 contract, or that they be deemed to be such. As a starting  
8 point, I note, as in Adelpia Business Solutions, that neither  
9 contract recites an intention that the two contracts be treated  
10 as a single contract, though the parties could have easily so  
11 provided, if that were their intention.

12 They have different terms. The Production Contract  
13 has a term of January 31, 2009 through January, 24, 2011. The  
14 Service Contract has a term of January [sic] 23, 2007 through  
15 December 31, 2010.

16 Neither cross-defaults to the other. In fact, neither  
17 contract mentions the other in any way.

18 Neither says that it is a master contract, or provides  
19 that it is subject to a master contract.

20 Each is a purchase order contract, with different  
21 consideration payable under each. The amount due to the seller  
22 under each contract is determined by the purchases under that  
23 contract, and not the other contract.

24 Neither contract has any provisions in it that make  
25 obligations under that contract dependent upon obligations or

1 performance under the other contract.

2           Though each has a termination for convenience clause,  
3 permitting termination upon payment of certain sums associated  
4 with that particular contract, neither conditions termination  
5 on any payment with respect to the other contract.

6           There is no indication that the contracts were signed  
7 at a single closing.

8           Each has an integration clause, without any stated  
9 exceptions, stating that it is the entire agreement between the  
10 parties, except for documents "specifically referenced" in the  
11 agreement. In fact, the Service Contract says that twice.

12           The nature of each document is the same; they're  
13 purchase agreements for different things. That reinforces the  
14 idea that they're two separate agreements. Neither has  
15 language that complements the other, or fills in gaps in the  
16 other. They just cover the purchase and sale of different  
17 items. Of course it's true that there is a relationship  
18 between the purchased products, and that this relationship was  
19 always contemplated. I assume it to be true, as Karmann  
20 argues, that the two contracts were executed with respect to a  
21 single program. But that doesn't make two separate agreements  
22 one, or militate as a factor by which they should be so  
23 considered.

24           Karmann's briefs on this motion put forward no case  
25 authority, or even factual argument, supporting its position

1 that these two agreements should be deemed to be one. In fact,  
2 it put forth no authority beyond the uncontroversial  
3 proposition, citing Kopel, that where seemingly separate  
4 documents are part of an integrated whole, they must be assumed  
5 or rejected together. And Karmann failed to address the facts  
6 I noted above, which are undisputed.

7 Instead, though only by oral argument, Karmann made  
8 two different points. It urged that the Production Contract  
9 and the Service Contract were related by reason of the content  
10 of the Nomination Letter, which suggested that they were both  
11 elements of a single "program". And it urged that Section 20  
12 of the Production Contract and the Service Contract made it  
13 necessary and appropriate to consider the two separate  
14 contracts as a unitary whole. In each case, I cannot agree.

15 First, the Nomination Letter was not itself a  
16 contract, having neither an offer nor an acceptance, and by its  
17 terms it was merely a statement of intention. The stated  
18 intention was to enter into one or more purchase orders. It  
19 did not state the intention to enter into only one or to enter  
20 into two that should be deemed to be one. Even if it were a  
21 contract, it could not modify the terms of the contracts we  
22 have here. As I've noted, each of the Production Contract and  
23 the Service Contract had an integration clause, superseding all  
24 prior oral or written representations and agreements. So even  
25 if it had a promissory component, it would be superseded by the

1 documents that were actually executed. And while it did at  
2 least seemingly make reference to what became the future  
3 Service Contract, it did not speak to whether the obligation to  
4 sell parts would be an element of the Production Contract or  
5 would be a separate agreement. If anything, the natural  
6 inference is the latter.

7 Possibly recognizing some or all of what I've just  
8 noted, Karmann places greater reliance on Paragraph 20 of the  
9 Production Agreement, suggesting that this supports its  
10 position that the two agreements should be deemed to be an  
11 integrated whole. But once more I cannot agree. Paragraph 20  
12 of the Production Contract makes no reference to the Service  
13 Contract or, for that matter, any other agreement. It contains  
14 a free standing covenant, as part of the larger Production  
15 Contract, requiring the sale of parts. And lest there be any  
16 uncertainty as to that, I must note that the same Paragraph 20  
17 also appears in the Service Agreement. It cannot be that  
18 Paragraph 20 in the Service Agreement reflects an intention to  
19 incorporate the Service Agreement into itself. It cannot be  
20 that Paragraph 20 reflects an intention to incorporate the  
21 Service Agreement as an adjunct to the agreement that already  
22 contains Paragraph 20, as no one could seriously suggest that  
23 the Service Agreement was incorporating itself.

24 In short, there is no basis for a determination that  
25 these two separate documents are in fact a single document, nor

1 is there any basis for a ruling that the two separate contracts  
2 should be deemed to be only one.

3 If Motors Liquidation wishes to reject the Production  
4 Contract, it may do so, without regard to the decision it makes  
5 with respect to the separate Service Contract.

6 Gentlemen, you're to confer with each other to work  
7 out a method for teeing up the remaining issues vis-à-vis the  
8 tools contract, for which I'm going to need to hold the  
9 evidentiary hearing. You're also to confer with each other as  
10 to whether an interim order or a separate order with respect to  
11 this aspect of the controversy is necessary or appropriate, and  
12 if either party believes that it is such an order should be  
13 settled on no less than two business days notice by fax or e-  
14 mail. Not by way of reargument, are there any open issues?  
15 Mr. Smolinsky?

16 MR. SMOLINSKY: Not from our side, Your Honor. Thank  
17 you very much.

18 THE COURT: All right. Mr. Kukla?

19 MR. KUKLA: No, Your Honor. Thank you.

20 THE COURT: All right, gentlemen. Thank you very  
21 much. Have a nice day. GM folks are excused from the line. I  
22 will be returning to the bench at 9:45 for Lyondell Chemical.  
23 We're in recess.

24 (Proceedings concluded at 9:36 AM)  
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I N D E X

RULINGS

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An Evidentiary Hearing	4	12
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is Required to Determine

if the Tools Contract

is Executory, but no

Evidentiary Hearing is

Required to Rule on Whether

the Production Contract

and the Service Contract

are a Single Integrated

Contract

The Production Contract	4	16
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and the Service Contract

are Two Separate

Contracts

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C E R T I F I C A T I O N

I, Hana Copperman, certify that the foregoing transcript is a  
true and accurate record of the proceedings.

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